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May 7, 1996

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Acting Secretary
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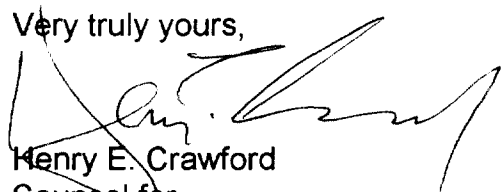
In the Matter of the Petition Filed by America's Carriers Telecommunication Association ("ACTA")
RM No. 8775

Dear Mr. Caton:

Transmitted herewith on behalf of Millin Publishing Group, Inc. are an original and seven (7) copies of its "Comments of Millin Publishing Group, Inc." as directed to the Commission.

Should any additional information be required, please contact this office.

Very truly yours,


Henry E. Crawford
Counsel for
Millin Publishing Group, Inc.

cc: The Commission

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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MAY 7 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

THE PROVISION OF INTERSTATE AND
INTERNATIONAL INTEREXCHANGE
TELECOMMUNICATIONS SERVICE VIA THE
"INTERNET" BY NON-TARIFFED,
UNCERTIFIED ENTITIES AMERICA'S
CARRIERS TELECOMMUNICATION
ASSOCIATION ("ACTA"),

Petitioner

RM No. 8775

VOCALTEC, INC.; INTERNET TELEPHONE
COMPANY; THIRD PLANET PUBLISHING INC.;
CAMELOT CORPORATION; QUARTERDECK
CORPORATION; AND OTHER PROVIDERS
OF NON-TARIFFED, AND UNCERTIFIED
INTEREXCHANGE TELECOMMUNICATIONS
SERVICES,

Respondents.

The Commission

COMMENTS OF MILLIN PUBLISHING GROUP, INC.

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Counsel for
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May 7, 1996

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SUMMARY OF FILING

As a leading publisher of specialized information services for business, legal, and computer professionals, Millin Publishing Group, Inc. ("Millin Publishing") files its comments in opposition to ACTA's Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking ("ACTA Petition"). Millin Publishing believes that establishing FCC regulation in this case, as requested by ACTA, will have a negative effect on the software industry as a whole and, in particular, will chill the development of voice enabled multi-media software.

There is no lawful basis for asserting FCC jurisdiction in the present case. Contrary to ACTA's claim, Respondents are not 'interstate telecommunications carries.' They are software developers whose products can be deployed on several platforms in a multitude of computing environments including closed networks and intranets. For the Commission to initiate regulation in this area would create a burden on software developers and electronic publishers that could seriously slow the growth of this emerging area of technology. That result is contrary to the expressed will of Congress and should not be adopted the Commission.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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Respondents.

The Commission

COMMENTS OF MILLIN PUBLISHING GROUP, INC.

Millin Publishing Group, Inc. ("Millin Publishing"),¹ by counsel, respectfully
submits its *Comments of Millin Publishing Group, Inc.* in response to the *Petition*

¹ Millin Publishing is a leading publisher of specialized information services for business, legal, and computer professionals. Millin Publishing is the publisher, *inter alia*, of Software Industry Report, EDP Weekly and the Federal Computer Market Report. As a publisher, Millin Publishing is uniquely interested in the potential for harm to multimedia publishing that is presented by the ACTA Petition. In fact, the present document is offered as an example of a voice enabled multimedia publication. This is to demonstrate the sort of publishing technology placed in jeopardy by the ACTA Petition. Diskettes accompanying the original and all Commission copies of this document contain the electronic

for Declaratory Ruling, Special Relief, and Institution of Rulemaking ("ACTA Petition") filed on March 4, 1996, by America's Carriers Telecommunication Association ("ACTA"). In support thereof, the following is stated:

I. INTRODUCTION

1. This case could well present a defining moment for the future development of software technology in this country. The ACTA Petition seeks nothing less than FCC regulation of an emerging segment of the software industry. It is a classic attempt by an established industry to use government protection to stymie the growth of an emerging industry which is perceived as a threat.



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Nothing could be more dangerous to the future expansion of American technology and its ability to compete on a global scale.

II. ARGUMENT

A. The Commission Lacks Jurisdiction Over Respondents In the Present Case

1. The Respondents are Not Telecommunications Carriers

2. ACTA's principal basis for asserting jurisdiction in this case is the unusual and illogical assertion that Respondents are "Interstate Telecommunications Carriers."² It cites³ the definitions contained in the

version. Other parties wishing to obtain the electronic document may download it along with a Microsoft Word viewer from the World Wide Web at "http://www.wizard.net/~crawlw/home.htm" Parties lacking a web browser may obtain the document by sending e-mail to undersigned counsel at "crawlw@wizard.net" or regular mail to the address of counsel listed on this pleading.

² ACTA Petition, p. 6.

³ Id.

Telecommunications Act of 1996 (the "Telecomm Act").⁴ ACTA does not, however, explain how these definitions apply to Respondents. Indeed, careful analysis reveals that they do not apply.

3. As ACTA notes, the Telecomm Act includes the following definitions:

(48) Telecommunications.--The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(49) Telecommunications carrier.--The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

(51) Telecommunications service.--The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

4. To be considered a 'telecommunications carrier' or a 'telecommunications service' within this framework of definitions, one must first engage in 'telecommunications' in accordance with category 48. In pertinent part, 'telecommunications' means the "... transmission, between or among points specified by the user..."

⁴ *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. §§ 151 et seq.).

5. The Respondents in the instant case are make software products.⁵ They do not transmit information or engage in the transmission of information. According to ACTA's own analysis, each company is a developer of a software "product."⁶ None of these companies are identified as owning, controlling or providing the means of transmission of information between any two points. In sum, these companies are not engaged in 'telecommunications' and, hence, cannot be providers of 'telecommunications services' as would be required to be considered 'telecommunications carriers.'

6. There are many products that can be used in connection with the Internet. Most stand-alone software products are presently being enhanced to contain the ability to interface with the Internet. By ACTA's overly broad reading of the Telecomm Act, all of these products would have to be classified as telecommunications carriers. However, no one can reasonably consider companies making such products as Web Browsers, FTP utilities or e-mail packages to be telecommunications carriers. And yet they bear essentially the same relation to the Internet as do the Respondents in the instant case. They are not telecommunications carriers and ACTA has not shown them to be. Therefore, the Commission lacks jurisdiction over the Respondents.

7. In the present case, jurisdiction cannot be maintained absent an overly broad and dangerous reading of the Telecomm Act. Were ACTA to be successful here, any number of industries effected by the Internet will come before the Commission claiming that these software companies are 'telecommunications carries' as well. Give the potential for harm to one of America's premier industries, Millin Publishing requests that the Commission

⁵ See, ACTA Petition, pp. 10-11, Information Regarding Respondents.

⁶ Id.

reject ACTA's undisciplined reading of the Telecomm Act and refuse jurisdiction in the instant case.

2. There is no Precedent for Asserting Jurisdiction Over Respondents

8. As shown above, there is no statutory basis for ACTA's jurisdictional claims. Additionally, despite ACTA's citation to United States v. Southwestern Cable Commission, 392 U.S. 157 (1968), there is no case law support for its claims.

9. Southwestern Cable involved the Commission's authority to regulate community antenna systems or CATV. It is significant that in Southwestern Cable, both the Congress and the Commission had been aware of CATV for a considerable period of time and the Commission had long before begun a process of asserting jurisdiction over CATV. Southwestern Cable, 392 U.S. at 165. Unlike the present Respondents, the Southwestern Cable Respondents were forced to concede that CATV systems were within the definition "communication by wire or radio." Southwestern Cable 392 US at 168. As demonstrated above, however, the present Respondents cannot be defined as telecommunications entities within the framework of the Telecomm Act.

10. In Southwestern Cable Congress itself had, at most, expressed neutrality over regulation. Southwestern Cable 392 US at 171. In the present case, however, Congress has clearly stated that it is the policy of the United States to:

...preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State Regulation....

Millin Publishing submits that given this well stated policy, it would be entirely contrary to the will of Congress for the Commission to exercise regulatory authority over companies such as Respondent that make software products for the Internet.

11. In sum, Southwestern Cable Commission does not stand for the proposition that the Commission has automatic jurisdiction over all new technologies. This is not a Federal Technology Commission. Absent some structural link that defines an entity as a telecommunications carrier, companies that make software products are outside the scope of the Commission's lawful jurisdiction.

B. The Commission Should Not Grant the Special Relief Requested by ACTA

12. To grant the special relief requested by ACTA would be nothing short of disastrous for the software and information industry. The Commission would have to block the sale of these products at software stores throughout the United States. Developers and publishers would exist in a state of uncertainty over whether their electronic products fell within the Commission's regulatory authority. This cloud would chill the development of real-time multi-media and other voice enabled products.

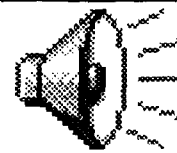
13. Because the Internet is a world-wide network, upholding the ACTA Petition would unfairly punish only software companies based in the United States. Only U.S. companies would have to file the tariffs and pay the fees suggested by ACTA. Software companies in countries outside the jurisdiction of the Commission could freely distribute their products on the Internet without any practical means of detection or enforcement. Consequently, only U.S. companies would be harmed by a grant of the special relief requested by ACTA.

14. Enforcement would present further difficulties. Since all traffic over the Internet travels in digital form, it would be virtually impossible to detect lawful from unlawful communications. Additionally, the Commission would have to institute reporting requirements covering the software industry in order to discover those companies involved in producing voice enabled software. However, even if the entire software industry complied with these reporting requirements, makers of freeware or shareware would most likely evade regulation.

15. These concerns present only the tip of the iceberg. Issuing a preliminary order blocking the sale and distribution of Respondents' software, in the absence of clearly established FCC jurisdiction, would create unprecedented dangers for the software industry. Therefore, Millin Publishing requests that the Commission soundly reject ACTA's request for special relief.

III. CONCLUSION

16. The ACTA Petition has been shown to lack any legal or factual basis. Respondents are not engaged in 'telecommunications' and are not 'telecommunications carriers.' Moreover, there is no case law or sound public policy reason for bringing these software products within the Commission's jurisdiction. If anything, such jurisdiction could seriously harm developers and publishers in the information industry.



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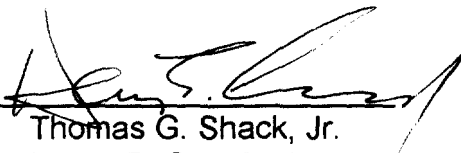
WHEREFORE, Millin Publishing Group, Inc. respectfully requests that the Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking filed by America's Carriers Telecommunication Association be denied in its entirety.

May 7, 1996

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Respectfully Submitted,

Millin Publishing Group, Inc.

By: 
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Its Attorneys

CERTIFICATE OF SERVICE

I, Henry E. Crawford, do hereby certify that copies of the foregoing
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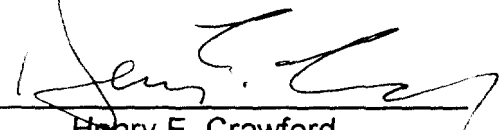
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